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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. NANSHON WILLIAMS et al., Defendants and Appellants.	B209721 (Los Angeles County Super. Ct. No. LA053527)

APPEAL from a judgment of the Superior Court of Los Angeles County. Darlene Schempp, Judge. Affirmed.

Victor J. Morse, under appointment by the Court of Appeal, for Defendant and Appellant Nanshon Williams.

Gary V. Crooks, under appointment by the Court of Appeal, for Defendant and Appellant Andre Harvey.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

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After jury trial, Nanshon Williams was convicted in count 1 of the second degree murder of sixteen-year-old D.R. (Pen. Code, § 187, subd. (a).)[1] Allegations that he personally and intentionally discharged a firearm proximately causing death (§ 12022.53, subd. (d)) and that the offense was committed for the benefit of a street gang (§ 186.22, subd. (b)(1)(C)) were found by the jury to be true. Williams was also convicted, in count 5, of assault with a firearm on Ramica R., D.R.'s older sister. (§ 245, subd. (a)(2).) The allegation that he personally used a firearm (§ 12022.5, subd. (a)) was found by the jury to be true, as was a gang enhancement under section 186.22, subdivision (b)(1)(C). He was sentenced to 47 years to life.

In the death of D.R., codefendant Andre Harvey was convicted of voluntary manslaughter. (§ 192, subd. (a).) A gang enhancement was found by the jury to be true. Like Williams, Harvey was also convicted of assault with a firearm on Ramica R. (§ 245, subd. (a)(2).) A gang enhancement was found by the jury to be true. He was sentenced to a total of 17 years in state prison.

Williams and Harvey appeal from their convictions. We affirm.

FACTS

On September 13, 2006, D.R., Ramica R., and a friend, Ashley White, visited Birmingham High School, then left the school and walked eastward on the south side of Haynes Street toward a bus stop on Balboa. White and Ramica R. observed appellants Williams and Harvey across the street, on the northwest corner of Balboa and Haynes. Appellants began to cross the street, walking toward them.

Ramica R. saw Harvey throw up his right hand with three fingers extended, which she took as a sign for the Birmingham neighborhood, and made a rolling motion. He said "rolling," then asked D.R. "where are you from?" Williams was touching the front of his pants, "messing with his shorts."

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[1] All further statutory references are to that code unless otherwise indicated.

Ramica R. testified that Harvey was the first person to speak. White testified that either Harvey or Williams spoke first. She did not remember which one.

D.R., who was a member of Liggett Street Bloods,[2] answered that he was from Liggett. In response, Williams made a circular motion which Ramica R. imitated in court: she grabbed her belt, crouched down, and spun in a counterclockwise motion. She also described his facial expression. He looked "like he has the person he wants or . . . Like, oh, I finally got it."

Harvey then said "come to the cut." Ramica R. understood "the cut" to mean, "a place where can't nobody see you." (Again, White did not remember whether it was Williams or Harvey who spoke.) At this point, appellants had started crossing the street. Ramica R., White, and D.R. were walking behind them. Ramica R. did not want to be in front of them.

Harvey opened his cell phone, put it to his ear, then closed it. D.R. asked him "who are you on the phone with? Are you calling your homies?"

According to Ramica R., Williams, who had been walking away from her group, turned around and faced them. He had a gun in his hand. He started shooting. D.R. shot back.

Bus driver Barbara Reid saw part of the crime. While she was stopped at a red light southbound on Balboa near Birmingham High School, she heard gunshots. She looked at the intersection and saw D.R. on one corner, along with the two women. D.R. was dancing as if he was dodging bullets. He was also attempting to pull his t-shirt up, as if he wanted to get something out of his pocket or his belt. He then extended his arm and started shooting.

After D.R. was shot, Ramica R. called 911 on D.R.'s cell phone. White hid D.R.'s gun in some shrubbery. The gun was a .25 handgun capable of holding five bullets.

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[2] Ramica R. was associated with that gang.

When it was recovered by police, it was empty. Both White and Ramica R. initially told police that D.R. had not had a gun, but later admitted that he had.

Shortly after the shootings, a passerby saw a young man hiding under a tree, on his cell phone, asking someone to hurry up. It looked as though he was holding something. A black sedan drove up at a high rate of speed, then stopped. The young man ran to the car, got in, and stayed low. The witness could not identify the man, but did testify that he was dressed in a blue t-shirt and blue shorts, which matched Ramica R.'s description of Harvey's clothing. (White testified to a white t-shirt and blue shorts.)

Another young Black male ran past this witness, but the witness was not sure whether that person got into the car.

This witness provided police with the license number of the black sedan. Police recovered the car. It was registered to a Bruce Williams. Appellant Williams's fingerprints were found inside.

D.R. sustained a gunshot wound to his abdomen and died of that wound. The bullet was recovered from his body. It was flattened on one surface, and the deputy medical examiner opined that it had ricocheted off some hard surface before hitting D.R.

LAPD Sergeant Gasior responded to the 911 call in about 15 minutes. At that point, "a lot of vehicular traffic" was still flowing on Balboa, and there were a lot of pedestrians on both sides of Balboa and Haynes. It was about half an hour before the intersection could be shut down.

Detective James Nuttall testified that police recovered three .380 casings in an alley located just east of Balboa and north of Haynes.[3] All three were fired by a single gun. Four .25 caliber casings were recovered from the vicinity of the southeast corner of Haynes and Balboa. Two days later, another .25 caliber casing was found near the southeast corner of Balboa and Haynes, a location Detective Nuttall had previously searched. Detective Nuttall testified that "it's possible casings could always be missed at

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[3] No .380 caliber gun was recovered.

crime scenes," and that it was not uncommon for casings at a crime scene to be moved by pedestrians or cars.

The parties stipulated that all three .380 casings were from the same gun, and that all of the .25 caliber casings were from D.R.'s gun.

Gang evidence

Ramica and White testified that D.R. was a member of the Liggett Street Bloods. This was a rival of the Whitsett Avenue Gangster Crips, and LAPD Officer Thomas Appleby, assigned to the Van Nuys gang enforcement detail, testified that Williams and Harvey were members of the Whitsett Avenue Gangster Crips. A school police officer testified that Williams had admitted his membership in that gang.

According to Officer Appleby, the sign Ramica R. observed Harvey make was "an aggressive motion," and could signify that the signer was in Rolling 30s, or was claiming Whitsett, or both.

Officer Appleby testified concerning two photographs. One (People's 31 and 32), taken in August of 2005, showed a group of males in Whitsett Avenue Gangster Crips clothing. Officer Appleby described this picture as "the definition of a gang." Harvey was in the picture, along with known members of Whitsett Avenue Gangster Crips and other Crips gangs. Harvey was throwing a Whitsett Avenue sign.

Officer Appleby described the other photograph (People's 33) as a "family shot" of the Whitsett Avenue gang, with senior people in the center, surrounded by the "youngsters." Harvey was in the photograph. He was in gangster clothes, standing gangster style. He was putting his right arm into his waistband, either indicating or simulating that he had a handgun. This photograph indicated that Harvey was associated with Whitsett Avenue Gangster Crips, and, according to Officer Appleby, Harvey's conduct in this case confirmed his membership in the gang.

Officer Appleby testified about the history of the Whitsett Avenue Gangster Crips and the gang's primary activities: murder, robberies, assaults with a deadly weapon, concealed weapon violations, and narcotics offenses.

The prosecution introduced abstracts of judgment showing that Daniel Wayne Rose had been convicted of assault with a firearm in 2005 and that Kendell Shaka Braughton had been convicted of attempted murder and other crimes in 2002. Officer Appleby testified that both were documented members of Whitsett Avenue Gangster Crips.

Officer Appleby testified that a "where you from" situation involved a division of labor. One gang member would identify members of the rival gang with "where you from?" Another gang member would be armed. That armed gang member would stand off, but as soon as the rival gang member identified himself, the armed gang member would brandish his weapon and take out the rival gang member. Gang members would not approach a rival gang unarmed.

When asked the level of violence which could occur once the words "where you from?" were spoken, Officer Appleby testified that "it can lead to just simple batting of the eyes or throwing gang signs, to where you can have a full-on shooting." When given a hypothetical involving the facts of this case (an encounter between rival gang members involving "where you from?" accompanied by a rolling gesture, the words "rolling," and three extended fingers, followed by "come to the cut" after the rival gang member identified himself), Officer Appleby opined that there was "about 100 percent probability" that the encounter would result in violence.

The day after the shooting, a notebook containing gang graffiti was recovered from Williams's residence. Writing included "WAGC," which according to Officer Appleby stood for Whitsett Avenue Gangster Crips; "IIShort," and "BK" crossed out. "IIShort" was Williams's gang moniker. "BK" meant "Blood killer," and the cross-out meant that a Blood gang member had been "crossed out."

DISCUSSION

Williams's Appeal

Williams argues that his convictions for the first degree murder of D.R. and assault with a firearm against Ramica R. must be reversed because there was insufficient evidence that he was the aggressor in the gun battle (that is, that he was the first to pull a gun or fire a gun) and insufficient evidence that his bullet killed D.R. In his view, the only reasonable inference which can be drawn from the evidence is that D.R. fired first, that he, Williams, fired only as he ran from the confrontation, and that D.R. was killed by a ricochet from his own gun. Thus, Williams concludes, there was insufficient evidence that he killed D.R. with malice rather than in justifiable self-defense (*People v. Barton* (1995) 12 Cal.4th 186, 199-200) or that he killed D.R. at all.

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We find no ground for reversal.

Ramica R. testified that Williams began to draw his gun while he was facing away from D.R., substantial evidence that Williams did not draw his gun in response to D.R. drawing his gun first. She also testified that Williams shot first. Reid testified that she had already heard gunshots when she saw D.R. get something from his pocket or waistband and start shooting. This is substantial evidence that Williams drew his gun first and shot first. It is true that, as Williams argues, White did not remember who spoke first and did not see who shot first, but given the evidence just cited, that is immaterial.

Nor do we agree with Williams that the physical evidence contradicted Reid's and Ramica R.'s testimony, rendering that testimony incredible. Williams argues that

Ramica R.'s statement that Williams shot first is undermined by the inability of police to find .380 caliber shell casings in the intersection, where Ramica R. placed Williams when he began to shoot. As to Reid, Williams points out that she initially told police that D.R. fired three shots before he ran away, but testified at trial that he fired more than three shots. He then points out that police found five casings from D.R.'s gun, and concludes that the only reasonable inference was that D.R. fired two shots before Reid observed him.

Reid's testimony was that "I don't know how many times he shot," and that the number she gave to police was an estimate. She testified that "I am not going to sit there and count bullets being fired." There is thus no real contradiction between her statements to the police and her trial testimony.

Further, the evidence was that the number and location of shell casings recovered was not determinative, but that casings could be overlooked, or could easily be moved by cars or pedestrians. The evidence that a casing from D.R.'s gun was recovered two days later, in an area previously searched, would have amply demonstrated that to the jury. Nothing in the evidence about shell casings renders any testimony incredible.

Williams also argues that Ramica R.'s testimony was "dubious" because she initially lied to the police, at first telling them that D.R. did not have a gun. "[I]it is not a proper appellate function to reassess the credibility of the witnesses." (*People v. Jones* (1990) 51 Cal.3d 294, 314-315.) We say the same about Williams's citation to discrepancies between Reid's statement to the police and her trial testimony.

Williams's final contention is that there is insufficient evidence that a shot from his gun killed D.R. No such evidence was needed. Under the provocative act murder doctrine, a defendant who instigates a gun battle by firing first will be guilty of murder even if another shot actually killed the victim. (*People v. Cervantes* (2001) 26 Cal.4th 860, 867-872; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1202.)

Harvey's Appeal

1. Sufficiency of the evidence

The jury was instructed, pursuant to CALJIC No. 3.02, that before Harvey could be convicted of voluntary manslaughter or assault with a firearm, "you must be satisfied beyond a reasonable doubt that . . . 1. The crime or crimes of unlawfully challenging to a fight and/or using offensive words likely to provoke an immediate violent reaction in violation of Penal Code section 415 were committed by defendant Harvey . . . 4. The crimes of murder, attempted murder, assault with a firearm . . . was a natural and probable consequence of the commission of the crimes of challenging to fight and/or using offensive words likely to provoke an immediate violent reaction."

Harvey argues that there was insufficient evidence of these elements, in several respects.

a. Evidence that he said "where are you from?" and "come to the cut"

Harvey argues that there was no substantial evidence that he made either statement. Ramica R. clearly testified that he did, but he argues that her testimony was inherently insubstantial, biased in favor of her brother and his gang, contradicted by White and Reid and the physical evidence, and impeached because she initially told police that D.R. did not have a gun, but later admitted that he had. We find none of these arguments persuasive.

The fact that White did not remember who spoke is immaterial to the substantial evidence analysis.[4] Ramica R.'s bias was for the jury to consider, as were inconsistencies in her statements to the police. Although Reid's testimony was in some respects inconsistent with Ramica R.'s (for instance, they placed the actors in different locations, and while Ramica R. testified that she gave D.R. a cell phone and that he made a call, Reid saw no phone), Ramica R.'s testimony about Harvey's statements was not contravened by Reid. The fact that two witnesses' observations differed does not render either witnesses' testimony incredible. "[T]wo people may witness the same event yet see or hear it differently." (CALCRIM No. 226, *People v. Chue Vang* (2009) 171 Cal.App.4th 1120, 1130.)

Harvey's argument about the physical evidence mirrors Williams's argument on this subject, that is, that Ramica R.'s testimony was inconsistent with the location of the shell casings recovered by police. Shell casings may be moved or overlooked, and as we have already explained, we see nothing in the physical evidence which rendered Ramica R.'s testimony insubstantial or incredible.

b. Section 415/Natural and Probable Consequences

Here, Harvey argues that even if there is substantial evidence that he made the statements discussed above, there is no substantial evidence that "where you from?" or "come to the cut" are fighting words likely to provoke an immediate violent reaction, and

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[4] Harvey argues that at the preliminary examination and in her statement to the police, White said that it was Williams who spoke. We have examined the transcript of the preliminary hearing and have discovered that she did indeed testify that Williams said "where you from?" and that "the other boy" said nothing. We cannot see that this changes our analysis. Ramica R. testified that Harvey spoke first. Her credibility was for the jury to decide. Nor (to anticipate the argument) do we find that reversible ineffective assistance of counsel resulted because defense counsel did not cross-examine White on this discrepancy. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674.) White was cross-examined on discrepancies between her testimony and statements to the police, and her preliminary hearing testimony. We cannot see that this one failure (if indeed there was no strategic choice) changed the outcome here.

thus insufficient evidence that he violated section 415. Along the same lines, he argues that there was insufficient evidence that voluntary manslaughter or assault with a firearm was a natural and probable consequence of "where you from?"

In factual support, Harvey cites Officer Appleby's testimony that reactions to "where you from?" can range from simple eye contact to a shooting. He contends that "come to the cut" does not change the equation because there was no violence immediately after those words were spoken. He also cites White's testimony that after D.R. identified himself as "from Liggett," D.R. asked appellants "where you from?" and that appellants replied "don't worry about it." In Harvey's view, this evidence means that he and Williams tried to diffuse the situation. He argues that because they did not claim gang membership, there was no clear and present danger that violence would erupt.

Harvey reads the evidence too narrowly. Officer Appleby did opine that "where you from?" can lead to consequences other than violence, but when presented with the facts of this case, he opined that violence was certain to result. He also described the division of labor through which gang members would accomplish their goal, vis a vis rival gang members: one gang member would issue verbal challenges and the other gang member would do the shooting.

"A reasonably foreseeable consequence is to be evaluated under all the factual circumstances of the individual case [citation] and is a factual issue to be resolved by the jury." (*People v. Medina* (2009) 46 Cal.4th 913, 920.) Officer Appleby's testimony constitutes substantial evidence from which the jury could properly find that "where you from?" and "come to the cut" were likely to provoke an immediate violent reaction, and also constitutes substantial evidence that murder, manslaughter, and assault with a deadly weapon were natural and probable consequences of those words, and Harvey's actions.

Harvey contends that there was no evidence that he knew that Williams had a gun. There was such evidence, in Officer Appleby's testimony that gang members would never approach rival gang members unarmed. At any rate, "prior knowledge that a fellow gang

member is armed is not necessary to support a defendant's . . . conviction as an aider and abettor." (*People v. Medina, supra,* 46 Cal.4th at p. 921.)

Finally on this issue, Harvey contends that the trial court erred by instructing the jury on the natural and probable consequences doctrine, because the killing was not a natural and probable consequence of this violation of section 415. We have found sufficient evidence from which the jury could find that murder and assault were natural and probable consequences of Harvey's actions, and so find no error.

2. Sufficiency of the evidence: the gang enhancement

"[T]o subject a defendant to the penal consequences of the STEP Act, the prosecution must prove that the crime for which the defendant was convicted had been 'committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.' (§ 186.22, subd. (b)(1) and former subd. (c).) In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a 'pattern of criminal gang activity' by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called 'predicate offenses') during the statutorily defined period. (§ 186.22, subds. (e) and (f).)" (*People v. Gardeley* (1996) 14 Cal.4th 605, 616-617.) Harvey alleges that there was insufficient evidence of several of these elements.

a. The predicate offenses

Harvey's first contention is that there was insufficient evidence that the predicate offenses were gang-related crimes. No such proof is required. Predicate offenses need not be gang related. (*People v. Gardeley, supra,* 14 Cal.4th at p. 624, fn. 10.)

b. The primary activities element

Harvey makes two arguments. First, he argues that Officer Appleby was indefinite about the sources of his information about the Whitsett gang and its activities, and thus that his testimony was not sufficient. We see no indefiniteness, and no inadequacy in his testimony. The prosecution can present sufficient proof of a gang's primary activities through expert testimony, and our Supreme Court has specifically held that a gang expert may base his opinion on conversations with gang members, investigations of crimes committed by gang members, and information from colleagues in his own police department and other law enforcement agencies. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; *People v. Gardeley*, *supra*, 14 Cal.4th at p. 620.)

Officer Appleby testified that he had been a police officer for 11 years and been assigned to gang enforcement in Van Nuys for 3 years. In that detail, he was assigned to monitor 4 gangs in the area, including Whitsett Avenue Gangster Crips. He (and other officers in the detail, with whom he shared information) gathered intelligence on gangs in and near their area by talking to gang members, taking crime reports from gang members who were the victims of crime, making arrests, serving search warrants, viewing gang websites, and attending conferences. He was qualified to testify as an expert, and his opinion is substantial evidence for the finding.

Harvey's second argument is that without statistics on the gang's nonviolent crimes, there was no way to tell whether murder, robberies, assault with a deadly weapon, concealed weapon violations, and narcotics offenses were the primary activity. We cannot see that such a statistical analysis is required. The statute requires only that the criminal acts enumerated in the statute be "one of" the gang's primary activities. Even if Whitsett Avenue Gangster Crips engaged in extensive nonviolent crime, Officer Appleby's testimony that murder, etc., were the gang's primary activities was substantial evidence for the jury finding.

c. "For the benefit" of a gang

Here, Harvey argues that the evidence shows that he and his codefendant were not members of the same gang, and that Officer Appleby's testimony to the contrary was not supported by substantial evidence, because it lacked foundation. He argues that his hand signs and the statement "rolling" meant that he was a member of the Rolling 30s, and that because he and Williams were not members of the same gang, the crime could not have been committed for the benefit of a gang.

We find substantial evidence that Harvey was a member of the Whitsett Avenue gang. Officer Appleby testified that the gang sign was consistent with membership in that gang, and that while it was also consistent with Rolling 30s, it was not uncommon for a gang member to claim two gangs. He further testified concerning the "family photograph" of the Whitsett Avenue gang. This photograph indicated that Harvey was associated with Whitsett Avenue Gangster Crips, and, according to Officer Appleby, Harvey's conduct in this case confirmed his membership in that gang.

In a letter brief, Harvey relies on *People v. Ochoa* (2009) 179 Cal.App.4th 650 to argue that the evidence was insufficient to show that the crime was committed for the benefit of a street gang. In that case, there were no gang signs or other indications during the crime. The victim was not a gang member, and the defendant was not accompanied by a fellow gang member. There was evidence that the defendant was a gang member, and that the crime, car jacking, was the defendant's gang signature crime, but nothing in the circumstances of the crime itself that indicated that it was connected to the gang. The court held: "The gang enhancement cannot be sustained based solely on defendant's status as a member of the gang and his subsequent commission of crimes." (*Id*. at p. 663.) Here, in contrast, a gang sign was displayed, and a gang-related question was asked. The victim was a rival gang member, and both defendants were members of the same gang. Nothing in *Ochoa* compels reversal here.

3. Exclusion of evidence - Ramica R.'s MySpace page

During trial, Harvey sought to introduce a videotape of Ramica R.'s MySpace page. Harvey's counsel described the tape: D.R. was "dressed up like a Blood," and Ramica R. "dressed up as Crip." D.R. threw some Liggett Street gang signs, then pretended to punch Ramica R. She dropped to the floor, and he pretended to jump up and down. Counsel argued that the tape was relevant to show D.R.'s intent to be violent toward Crips, that he had a propensity for violence, and that he initiated the attack. Counsel represented that the video was on Ramica R.'s MySpace page about two weeks before this crime, and argued that the attack had been planned two weeks in advance. The prosecutor objected on foundation grounds (from viewing the tape, he was not sure who was in it) and on grounds of relevance. The court deferred its ruling.

Ramica R. was asked about her MySpace page on cross-examination. She testified that the page had a picture of her and D.R. making Liggett Street signs, that her brother had asked her to make the signs, but that for herself, it was just "a picture of me and my brother, not us taking it as being a gang picture."

When the admission of the video was next raised, the court ruled that it would be excluded under Evidence Code section 352. The court ruled that if the page had shown an actual crime of violence, the evidence would have been admitted, but that "this is playacting. It is no different than Marlon Brando shooting the Godfather or something. Would that show a propensity to commit violence? No. So I am not going to allow it. I think it is irrelevant."

Harvey contends that the exclusion of the evidence was an abuse of discretion and violated his federal due process rights.

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. . . . its exercise of that discretion 'must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest

miscarriage of justice. [Citations.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) We can see no abuse of discretion. The jury heard evidence that Ramica R. was associated with Liggett Street Bloods, that D.R. was a member of that gang, that D.R. was armed, that appellants were members of Whitsett Crips, and that Crips and Bloods were rivals. Officer Appleby's testimony about the conduct of gang members was not limited to testimony about Whitsett Avenue Gangster Crips, and was relevant to D.R.'s conduct, too.

The videotape would, at most, have repeated this information, and could easily have consumed undue amounts of time, as the nature of the playacting and a MySpace page were explored.

Nor do we see a violation of constitutional rights. An "attempt to inflate garden-variety evidentiary questions into constitutional ones is unpersuasive. 'As a general matter, the "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." [Citations.] Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense.' [Citations.]" (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428.) Given the evidence of gang membership and activity already before the jury, the videotape clearly involved a minor point. Exclusion of the video of Ramica R. and D.R. "playacting" a violent encounter did not impair Harvey's due process rights.

4. Prosecutorial misconduct

Harvey recites numerous statements by the prosecutor which he contends amount to prosecutorial misconduct. No objections were made at trial and the arguments are forfeited. On appeal, a defendant may not complain of prosecutorial misconduct unless there was a timely objection in the trial court, and a request that the jury be admonished to disregard the impropriety. (*People v. Ochoa* (1998) 19 Cal.4th 353, 427.)

Harvey also argues that the failure to object constituted ineffective assistance of counsel. "The standard for establishing ineffective assistance of counsel is well settled.

A defendant must demonstrate that: (1) his attorney's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674.) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Ibid.*)" (*People v. Stanley* (2006) 39 Cal.4th 913, 954.) In examining a claim of ineffective assistance of counsel we defer to trial counsel's reasonable tactical decisions and exercise a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance. (*Ibid.*)

We examine each of Harvey's contentions in turn, and can find no instance in which a failure to object could constitute ineffective assistance of counsel.

a. Contentions that the prosecutor misstated the facts[5]

-- The prosecutor argued that when gang members "hit up" other gang members (that is, instigated an encounter like the one here), it was "common knowledge that shooting results." Harvey argues that this is a misstatement of the evidence in that Officer Appleby testified that "where you from?" could have a variety of consequences.

At the cited pages, the prosecutor did no more than argue that Harvey was guilty as an aider and abettor because he had issued a gang challenge, and that the shooting was a natural and probable consequence of that challenge. This argument was consistent with Officer Appleby's testimony, and was well within the prosecutor's "wide latitude" to draw inferences from the evidence. (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

-- The prosecutor argued that "Harvey is doing all the talking. . . . He is the aggressor," and that Harvey "was doing all the talking. So he is the shotcaller." Harvey contends that the evidence on who did the talking was ambiguous, so that it was improper to argue that he did the talking or to ask the jury to draw conclusions from that fact.

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[5] Harvey also argues that the prosecutor improperly argued that both appellants dove into a car to make a getaway. He provides no page citation, and we can find only an argument that Harvey dove into a car to make his getaway, an argument which Harvey acknowledges is supported by the evidence.

There was no misstatement of the evidence. Ramica R. testified that Harvey was the one who spoke, and the prosecutor was entitled to argue that evidence.

-- Harvey contends that the prosecutor improperly argued that he, Harvey, was armed, although there was no evidence that he had a gun. The prosecutor did at one point argue, "Harvey had the gun earlier . . . ," but followed the statement by saying "now, this is circumstantial evidence, and it is an interesting argument, but it should be made." The prosecutor then cited the evidence that Williams had been on the Birmingham High School campus earlier on the day of the crimes, argued that while "maybe" he would have taken a gun with him to the dean's office, he probably would not have done that, for fear of being searched, and would have given Harvey the gun.

Harvey's possession of the gun is a reasonable inference which could be drawn from the evidence. And, given that the prosecutor qualified the argument ("now, this is circumstantial evidence") we can see no probability that defense counsel's failure to object changed the outcome.

-- The prosecutor argued that appellants "armed themselves" and went to the school, looking for gang members. Harvey argues that this was improper because there was no evidence that he was armed. We do not see in the expression "armed themselves" a statement that Harvey was armed. Instead, the prosecutor was arguing, as he did consistently, that appellants were acting in concert. This was consistent with Officer Appleby's testimony concerning the division of labor in gang encounters.

b. Contentions that the prosecutor argued facts outside the record

Harvey's first objection under this heading is to the prosecutor's statements that D.R. had a right to self-defense as soon as Harvey said "where you from?" The argument is actually that this is an incorrect statement of the law. Respondent at least impliedly agrees. However, as respondent also argues, the jury was correctly instructed that it was to follow the court's instructions on the law, not the statements of counsel. Moreover, the import of the argument was that D.R. was not the instigator of the violence, a perfectly

proper theory. Failure to object to this argument could not have changed the outcome here.

Also under this heading, Harvey cites a fairly convoluted part of the prosecutor's argument, concerning Harvey's possible possession, at one point, of the gun. As we have seen, the prosecutor said that there was an "interesting argument," based on circumstantial evidence, that Harvey had earlier had the gun. The prosecutor argued that Williams ". . . is a gang member. . . . He is probably going to get searched, probably would not have done that. [¶] So he starts out -- theoretically, I am saying that this is proven beyond a reasonable doubt, any reasonable doubt at all. But this is one factor you can consider when you are looking at the evidence in this case. Theoretically, circumstantially, he starts off without the gun. I mean unless you believe he went in the dean's office with it. Then he has got the gun. Then he doesn't have the gun because Harvey is the one who is acting like he has got it in his waistband. . . ."

Harvey contends that by arguing that this circumstantial theory was proven beyond a reasonable doubt, the prosecutor was invoking his personal prestige and the prestige of his office and became his own unsworn witness. We see nothing objectionable in the argument. The prosecutor was clearly arguing a circumstantial theory which the jury could consider. He did not testify to any facts, or commit misconduct.

c. Vouching

Harvey called several witnesses who had known him at various times and who testified that he was not a gang member. On cross-examination, the prosecutor showed each witness either People's 32 or People's 33, and asked each witness if he or she recognized Harvey, and whether the photograph indicated that Harvey was a gang member. Some of the witnesses identified Harvey and some did not, but all testified that the photograph did not indicate gang membership.

The prosecutor argued, "Every defense witness for Harvey said that the photograph would not change their opinion about whether Harvey is a gang member.

That's a sham. I don't think anybody believed that for a second. Only a lawyer could stand there and point to a photograph like that and say it is not what it appears to be, that it is a gang photo. . . ." Harvey argues that the prosecutor thus vouched against defense witnesses and for the validity of the photographs, which were not otherwise authenticated.

We see no improper vouching. Officer Appleby testified that the photographs indicated gang membership. Harvey's witnesses testified to the contrary. The prosecutor was entitled to argue that Harvey's witnesses were disingenuous in their answers.

d. Misrepresentation to the court

This contention concerns statements made by the prosecutor during argument on the admission of Ramica R.'s MySpace page. Harvey argues that the prosecutor committed misconduct by representing to the court that Ramica R. had testified that she was a member of or associated with Liggett Street, when in fact she had testified that she was not a member.

These are the facts: On direct examination Ramica R. testified that she was associated with Liggett Street. On cross-examination, she testified she was not a member of Liggett Street. Right after her cross-examination, during argument on the admissibility of the tape, the prosecutor said that Ramica R. had admitted her gang affiliation. Later, the prosecutor argued to the court that Ramica R. had admitted her association with the gang. These were not misrepresentations, but were accurate representations of the evidence.

Finally, Harvey argues cumulative error. Having found no error, we find no cumulative error.

5. Sentencing

Harvey was sentenced to the middle term on the voluntary manslaughter conviction. He contends that the court abused its discretion with this sentence, because the only factor cited was a mitigating factor. Citing *People v. Sandoval* (2007) 41 Cal.4th

825, 847, he also contends that the court failed to give a statement of reasons for the sentence.

The facts are these: After the prosecutor asked the court to impose the high term, the court stated that it did not intend to impose that term, and that "as a mitigating factor" Harvey had only a juvenile conviction "so the court intends to impose the mid-term . . . ." Counsel for Harvey said, "I will submit it then." The court ruled, "As the mitigating factor, at this point he only had a juvenile matter, so the court intends to impose the mid-term . . . ."

We see no abuse of discretion. (*People v. Sandoval, supra*, 41 Cal.4th at p. 847.) The court did not find that the only relevant factor was a mitigating factor. Rather, the court, stating its reasons, found that the high term was not called for, given Harvey's criminal history. As respondent notes, the probation report is replete with circumstances in aggravation.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, J.

I concur:

TURNER, P. J.

MOSK, J., Concurring and Dissenting

It is a stretch to assert that defendant Harvey somehow committed or aided and abetted a violation of Penal Code section 415—a misdemeanor—and that a killing is a natural and probable consequence of that target offense. Are the words, "where are you from?" "offensive words in a public place which are inherently likely to provoke an immediate violent reaction"? (Pen. Code, § 415, subd. (3).) Here, it was Williams that shot first. There was no violent reaction from the words. It was only after the victim taunted Williams that the latter started shooting. To leap from this series of events to the killing being a natural and probable consequence of the "where are you from?" statement does not seem to comport with the purpose of the doctrine. If the expert testimony can supply the evidence necessary for the target offense, the natural and probable consequence, and the gang enhancement, we are getting to the point where the expert is providing all the evidence to support the guilty verdicts.

It may well be that Harvey is an aider and abettor, but I question the use of the natural and probable consequence instruction. I would reverse Harvey's convictions on the basis of the instruction. I would affirm the convictions of defendant Williams.

MOSK, J.